

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 JUN -1 PM 3:38

JEANNE HICKS, CLERK

BY: L. Cregno

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) Yavapai Superior

) Court No.

) P1300CR20081339

) Excerpt of Jury

) Trial; Testimony

) of Jana Johnson

) (outside of

) Jury's presence)

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Proceedings held before the Honorable Thomas B. Lindberg

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Prescott, Arizona

May 26, 2010

Sandra K Markham, CR, RPR, CSR

Certified Reporter

Arizona License No. 50001

ORIGINAL

SANDRA K MARKHAM, CR, RPR

OFFICIAL COURT REPORTER

1 **APPEARANCE OF COUNSEL:**

2 For Plaintiff:
3 JOSEPH BUTNER
4 JEFFREY PAPORE,
 Deputy County Attorneys,
 Yavapai County Attorney's Office.

5 For Defendant:
6 JOHN M. SEARS,
 Attorney at Law.

7 LARRY HAMMOND,
 Attorney at Law.

8 ANNE CHAPMAN,
9 Attorney at Law.

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I N D E X

WITNESS:
JANA JOHNSON

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14:03:16 1 THE BAILIFF: The clerk will swear you in. Raise
14:03:21 2 your right hand, when they're done talking.

14:04:01 3 THE COURT: You are Ms. Johnson?

14:04:06 4 JANA JOHNSON

14:04:20 5 called, sworn, and testified as follows:

14:04:20 6 THE BAILIFF: Just have a seat.

14:04:34 7 DIRECT EXAMINATION

14:04:34 8 MR. BUTNER:

14:04:34 9 Q Good afternoon.

14:04:35 10 A Hello.

14:04:37 11 MR. BUTNER: May I proceed, your Honor?

14:04:38 12 THE COURT: You may.

14:04:38 13 MR. BUTNER:

14:04:39 14 Q Please state your name for the record?

14:04:40 15 A Jana Johnson.

14:04:41 16 Q And what is your occupation, Ms. Johnson?

14:04:44 17 A I'm a home maker.

14:04:46 18 Q And where do you presently reside?

14:04:49 19 A 2390 West Glenshandra Drive in Prescott.

14:04:54 20 Q 2390 West Glenshandra. And how long have you
14:04:59 21 lived out on Glenshandra Drive here in Prescott?

14:05:02 22 A Three years.

14:05:02 23 Q And so you lived out there on July the second of
14:05:08 24 the year 2008?

14:05:09 25 A I did. I do.

14:05:12 1 Q And drawing your attention to that specific day,
14:05:19 2 do you remember what you were doing sometime in the
14:05:23 3 afternoon on July the second of the year 2008?

14:05:26 4 A I do. Our kids were coming up from Phoenix and
14:05:30 5 we were going to celebrate July the 4th and I was making a
14:05:34 6 new tablecloth and napkins for my outside picnic table and
14:05:38 7 I was in my sewing room in the front of the house.

14:05:41 8 Q Would you kind of describe where your sewing room
14:05:45 9 sits at your house for us please?

14:05:47 10 A It's in the very front and there's a big window
14:05:51 11 there, and I can see directly out to the street.

14:05:55 12 Q Okay. And so you were sewing in your sewing
14:05:59 13 machine working on the tablecloth and napkins for the
14:06:02 14 holiday weekend?

14:06:03 15 A That's correct.

14:06:04 16 Q Okay. And did something out of the ordinary
14:06:08 17 catch your attention?

14:06:09 18 A Yes.

14:06:10 19 Q What was it?

14:06:11 20 A It was a man on a bicycle with a backpack on.

14:06:17 21 Q Okay. And what was it about this man on a
14:06:22 22 bicycle with a backpack on that drew your attention?

14:06:25 23 A Well, I just happened to notice it because the
14:06:28 24 sun was just start to go down, and it was still real
14:06:31 25 bright out there, and, um, I just happened to look up and

14:06:36 1 I always like to be aware what of is going on in the
14:06:39 2 neighborhood. If I see anything I check it out you know.

14:06:42 3 And so --

14:06:43 4 Q Okay. Why are you so attentive to what's going
14:06:47 5 on in the neighborhood so to speak?

14:06:49 6 A Well, I lived in Phoenix for a long time, and my
14:06:55 7 son-in-law is a police officer, and I have always been
14:07:00 8 interested in what's around me you know.

14:07:04 9 Q Have you been involved in any neighborhood watch
14:07:07 10 or block watch type of activities while were you living in
14:07:09 11 Phoenix?

14:07:10 12 A I was.

14:07:11 13 Q What did you do in that regard?

14:07:12 14 A We lived across the street from a park and I
14:07:17 15 could see the bathrooms over there real close on the other
14:07:21 16 side of the parking lot, and there was these red and black
14:07:24 17 vehicles that kept coming and going, and I had talked to
14:07:29 18 someone and they wanted me work with the police department
14:07:33 19 to give them cars and license numbers and I had a little
14:07:39 20 monocular that I used and got the license plates number
14:07:44 21 and I would fax it to them.

14:07:46 22 Q So you had kind of engaged in this observation
14:07:51 23 kind of activity in the past; is that right?

14:07:53 24 A Right. Uh-huh.

14:07:54 25 Q Okay. So you saw this man on a bike go past with

14:07:59 1 a backpack on his back.

14:08:01 2 Was there anything else about this person
14:08:03 3 riding by that you thought was out of the ordinary?

14:08:07 4 **A** Um, they were going pretty fast and in our
14:08:10 5 neighborhood, we don't see a lot of people riding bikes
14:08:13 6 because it's mostly a retired area, and if they do,
14:08:17 7 they're usually families or something that are together.
14:08:20 8 Occasionally I will I see somebody. But they were going
14:08:23 9 pretty fast and it seemed like he was on a mission or
14:08:29 10 something and --

14:08:30 11 **Q** Okay. And was that unusual?

14:08:33 12 **A** It seemed, yeah.

14:08:34 13 **Q** Which way was this person riding on going
14:08:38 14 Glenshandra?

14:08:38 15 **A** From west to east.

14:08:40 16 **Q** Okay. And from your house, which way is the
14:08:44 17 trailhead gate at the end of Glenshandra?

14:08:47 18 **A** On the very east.

14:08:49 19 **Q** So was this person riding toward the trailhead
14:08:52 20 gate?

14:08:52 21 **A** Yes. Uh-huh.

14:08:53 22 **Q** How was this person dressed?

14:08:55 23 **A** Well, the best I can remember, all I really
14:08:58 24 remember was probably Levis or blue jean type pants and I
14:09:05 25 am not real positive about the rest of it.

14:09:08 1 Q Okay. But long pants?

14:09:10 2 A I believe so.

14:09:11 3 Q Was that -- did that strike you as being unusual?

14:09:14 4 A Well, it was pretty hot, yeah. But my husband

14:09:17 5 wears Levis all the time.

14:09:19 6 Q Your husband wears these kind of pants even when

14:09:22 7 it's July the 2nd in Arizona?

14:09:23 8 A Yeah. Exactly.

14:09:24 9 Q Okay. And speaking of your husband, was there

14:09:27 10 anything that you were able to tell about the build of the

14:09:30 11 person that was riding this bicycle?

14:09:32 12 A Yeah. I -- I sort of transferred it to the about

14:09:36 13 the size of my husband. He is like six-one, 170 pounds,

14:09:41 14 and the person seemed on the tall side because of the way

14:09:47 15 his legs were on the bike. They weren't stretched out at

14:09:51 16 all like a shorter person, and they were bent like, you

14:09:56 17 know.

14:09:56 18 Q Okay. And speaking of the bike, were you able to

14:09:58 19 tell anything about the bike? What color it was, first of

14:10:02 20 all?

14:10:02 21 A No. The best I remember, the only thing I

14:10:05 22 remember are the tires did not have fenders and the tires

14:10:08 23 were probably about this wide.

14:10:11 24 Q When you that wide, what is that? How much would

14:10:14 25 you say that is? What you are showing us?

14:10:17 1 A Two-and-a-half inches. I don't know.

14:10:19 2 Q Okay. So the tires had no fenders on them?

14:10:22 3 A No.

14:10:22 4 Q And the tires were about two-and-a-half inches

14:10:26 5 wide?

14:10:26 6 A Yeah. They weren't the skinny type.

14:10:27 7 Q They weren't the skinny racing type wheels?

14:10:30 8 A No.

14:10:30 9 Q They were the little fatter type?

14:10:32 10 A Uh-huh.

14:10:33 11 Q Is that yes?

14:10:33 12 A Yes.

14:10:34 13 Q Okay.

14:10:35 14 A I'm sorry.

14:10:36 15 Q All right. And how long was this person riding

14:10:39 16 the bicycle in your view approximately if you could tell

14:10:42 17 us?

14:10:42 18 A From here to there. Whoop. I don't know how

14:10:46 19 fast it was.

14:10:47 20 Q A matter of seconds?

14:10:49 21 A Probably, yeah.

14:10:51 22 Q Okay. And were you able to see the person's face?

14:10:53 23 A I was not.

14:10:54 24 Q Okay. So there is no way you could identify that

14:10:58 25 person's face?

14:10:59 1 A I could not.

14:11:00 2 Q And is there anything else that you recall about
14:11:04 3 this particular person riding by on this bicycle that you
14:11:09 4 recall at this point?

14:11:10 5 A Just the backpack and it had something heavier in
14:11:13 6 the bottom kind of.

14:11:16 7 Q All right. Excuse me for just a moment.

14:11:24 8 (Discussion held off the record.)

14:11:31 9 MR. BUTNER:

14:11:32 10 Q Approximately -- approximately how far away were
14:11:37 11 you when you were seated in your sewing room from the
14:11:42 12 person that went by on the bicycle?

14:11:45 13 A I don't know. The police officers that came out
14:11:47 14 measured it.

14:11:48 15 Q But you don't really know?

14:11:50 16 A I don't know exactly. I mean, you know, we have
14:11:52 17 got a front yard, a circle drive and then more out to the
14:11:57 18 road. But I could see it plainly.

14:12:00 19 Q Was there anything between you and the person
14:12:05 20 that went by on the bicycle? Anything to obscure your
14:12:08 21 vision?

14:12:09 22 A No. Once he passed the big tree on the right, I
14:12:13 23 could see fine because, you know, there's not really
14:12:17 24 anything that would block it.

14:12:19 25 Q Okay. And here we are in a courtroom. There's

14:12:22 1 the back wall of the courtroom. Was he as far away as the
14:12:25 2 back wall of the courtroom?

14:12:26 3 **A** Um, possibly. Yeah.

14:12:30 4 **Q** Was he farther away?

14:12:31 5 **A** I don't know how to measure --

14:12:35 6 **Q** Okay.

14:12:36 7 **A** -- distance.

14:12:37 8 **Q** Okay. All right. Could you tell the age of this
14:12:40 9 person?

14:12:40 10 **A** No. I really couldn't.

14:12:44 11 **Q** Is there anything else about the bicycle that you
14:12:47 12 could tell us?

14:12:48 13 **A** No.

14:12:51 14 **Q** Okay. All right. I don't have any further
14:12:54 15 questions. Thank you very much.

14:12:56 16 **A** Okay.

14:13:03 17 THE COURT: Mr. Sears.

14:13:05 18 MR. SEARS: Your Honor, before I ask Ms. Johnson
14:13:07 19 any questions, I would simply renew my motion to preclude
14:13:10 20 her. If this is the sum of her testimony, that's clearly
14:13:14 21 not relevant. She hasn't come close to identifying the
14:13:18 22 defendant or his bicycle.

14:13:20 23 I have far more cross-examination, but just
14:13:23 24 based on what she has said here today, if this is her
14:13:26 25 proposed trial testimony, it's not relevant.

14:13:30 1 THE COURT: Any other facts that you think you
14:13:32 2 need to bring out that haven't been brought up?

14:13:34 3 MR. BUTNER: No. I think that's the sum total of
14:13:37 4 her testimony, Judge, and if you want to argue whether
14:13:40 5 it's relevant at this point in time, we're prepared to do
14:13:43 6 that.

14:13:44 7 THE COURT: Why don't you go ahead and give me
14:13:49 8 the fine points of your argument.

14:13:52 9 MR. BUTNER: Sure. Judge, this lady is --

14:13:55 10 MR. SEARS: Your Honor, if we are going to do
14:13:57 11 this, and if I wind up having more questions, could we
14:13:59 12 have Ms. Johnson step down?

14:14:01 13 THE COURT: Could we have you step out just
14:14:03 14 momentarily, Ms. Johnson.

14:14:04 15 THE WITNESS: Sure.

14:14:05 16 MR. SEARS: Thank you, your Honor.

14:14:06 17 (Witness Johnson left courtroom.)

14:14:21 18 THE COURT: The Court takes the testimony
14:14:22 19 essentially as an offer of proof of what the testimony
14:14:24 20 would be presented by the State.

14:14:27 21 Mr. Butner.

14:14:28 22 MR. BUTNER: Judge -- well, let's start with the
14:14:33 23 very basic proposition that relevant evidence means
14:14:35 24 evidence having any tendency to make the existence of any
14:14:38 25 fact that is of consequence to the determination of the

14:14:41 1 action more probable or less probable than it would be
14:14:45 2 without the evidence.

14:14:46 3 And basically what we're talking about here
14:14:49 4 is a theory from the State that the person that killed
14:14:54 5 Carol Kennedy on July 2nd of the year 2008 was somebody
14:14:59 6 that got there on a bicycle and then proceeded from where
14:15:03 7 they had parked their bicycle in the bushes in the land
14:15:06 8 behind the Bridle Path residence and at the end of the
14:15:10 9 Glenshandra trailhead and then hiked over and jumped the
14:15:15 10 fins and committed the homicide, and then hiked back to
14:15:18 11 where their bicycle was parked.

14:15:20 12 Well, here we have in essence somebody that
14:15:25 13 saw somebody ride by at a higher rate of speed than was
14:15:30 14 normal for that in the neighborhood on a mission, so to
14:15:34 15 speak, carrying a backpack. In this particular case, we
14:15:39 16 believe we are missing things from the homicide scene that
14:15:43 17 could have been carried away by a backpack. We also think
14:15:46 18 that our killer probably either brought attire with him or
14:15:52 19 her or brought attire or took attire away, so to speak.
14:15:58 20 Clothing away and a backpack. Could have been used for
14:16:01 21 that.

14:16:02 22 And that is at the approximate time of day
14:16:05 23 when the killer would have arrived, and of course.

14:16:08 24 THE COURT: For the record, that's A-T-T-I-R-E.

14:16:11 25 MR. BUTNER: Yes.

14:16:12 1 THE COURT: Clothing.

14:16:13 2 MR. BUTNER: Exactly. Not a tire. Right. To
14:16:17 3 clarify. That's correct.

14:16:19 4 Clothing. Yes.

14:16:21 5 And of course we believe that it was
14:16:24 6 Mr. Democker. We believe he rode his bicycle down
14:16:28 7 Glenshandra from where he had parked his vehicle across
14:16:35 8 Williamson Valley Road and it's a very short bike ride and
14:16:39 9 he can be on a mission in that fashion and then he can
14:16:44 10 hike to the scene of the homicide.

14:16:46 11 This viewing of this individual that went
14:16:50 12 by, it occurs at a time when the sun is going down.
14:16:54 13 That's the approximate time that Mr. Democker would have
14:16:57 14 gone by there on his bicycle, and this is I think highly
14:17:04 15 relevant evidence, material evidence, and probative of the
14:17:11 16 facts in this case.

14:17:12 17 It also links up with the defendant's
14:17:15 18 admissions that he was riding his bicycle in the
14:17:17 19 neighborhood at the time of the offense, and of course,
14:17:26 20 yeah, we have a mountain bike with tires about that big as
14:17:30 21 demonstrated by the witness. I guess two-and-a-half
14:17:33 22 inches or so. We have that seized in evidence without
14:17:37 23 fenders on it that would have been the bike that
14:17:41 24 Mr. Democker was riding at the time of the incident, at
14:17:46 25 the time of the homicide.

14:17:47 1 THE COURT: I am not prepared to rule solely on
14:17:50 2 the basis of what has been presented so far, if you want
14:17:52 3 to have your cross.

14:17:53 4 MR. SEARS: Thank you, your Honor. If you want
14:17:54 5 to bring her back in.

14:18:15 6 JANA JOHNSON
14:18:26 7 previously sworn in, resumed the stand:

14:18:26 8 THE COURT: Thank you, Ms. Johnson, for your
14:18:28 9 patience with us.

14:18:29 10 Mr. Sears may now have some questions for
14:18:31 11 you.

14:18:32 12 THE WITNESS: No problem. Okay.

14:18:34 13 CROSS-EXAMINATION

14:18:34 14 MR. SEARS:

14:18:35 15 Q Good afternoon, Ms. Johnson.

14:18:36 16 A Hello.

14:18:37 17 Q Good to see you again.

14:18:38 18 A Thank you.

14:18:38 19 Q You remember Mr. Robertson?

14:18:40 20 A I do.

14:18:40 21 Q My investigator. Come to see you just a few
14:18:43 22 weeks ago.

14:18:44 23 Mr. Robertson and I came and saw you and
14:18:47 24 your husband in your home on May 11th of this year; isn't
14:18:49 25 that right.

14:18:49 1 A Uh-huh. Yes.

14:18:51 2 Q Okay. And then Mr. Robertson came back the next
14:18:55 3 day and talked to you some more. Do you remember that?

14:18:57 4 A Right.

14:18:57 5 Q Have you talked to anybody, any police officers
14:19:00 6 or investigators or detectives from the prosecution since
14:19:04 7 Mr. Robertson afternoon I were out to see you?

14:19:06 8 A Just Mr. Butner.

14:19:08 9 Q When was that?

14:19:09 10 A When did I talk to him?

14:19:11 11 Q Yes.

14:19:11 12 A I have talked to him once on the phone and then I
14:19:14 13 came into his office, I believe it was last Friday. I
14:19:19 14 think it was last Friday, yeah, because everybody was
14:19:21 15 going home. Yeah.

14:19:22 16 Q My understanding is that you talked to the police
14:19:24 17 first about what you saw that night on September 30th of
14:19:29 18 2008; is that right?

14:19:30 19 A Correct.

14:19:30 20 Q Have you been shown a transcript of your
14:19:33 21 statement to the police?

14:19:34 22 A I have.

14:19:34 23 Q When did you see that?

14:19:35 24 A After Mr. Butner gave to it me on Friday.

14:19:39 25 Q Okay. And in your September 30th, 2008

14:19:48 1 statement, you said a couple of things that I wanted to
14:19:51 2 ask you about again today.

14:19:53 3 The first thing that you said was that you
14:19:56 4 described the person that you saw as a boy originally?

14:19:59 5 A A boy. Well, I really can't remember for certain
14:20:04 6 if it was a boy or a man. It was just a man going down
14:20:10 7 the road.

14:20:12 8 Q You said that you thought that you had an
14:20:14 9 opportunity to see the person on the bicycle for probably
14:20:17 10 five or six seconds. Does that sound about right?

14:20:19 11 A I guess. I don't --

14:20:22 12 Q You said originally that Detective McDormett here
14:20:27 13 came to see you in September of 2008 and he asked you at
14:20:33 14 page ten, line 15: Okay. And about what time of night
14:20:36 15 was this?

14:20:37 16 And your answer was: Well, I think it was
14:20:39 17 probably, I am thinking, between two o'clock and five
14:20:42 18 o'clock in the afternoon maybe. I -- I can't really
14:20:44 19 remember when I am in there, but it could have been a
14:20:46 20 little later, but I think it was in the afternoon, late
14:20:48 21 afternoon.

14:20:49 22 Detective McDormett said: Late afternoon?

14:20:51 23 You say: Maybe, yeah.

14:20:52 24 Now, this was just less than two months
14:20:56 25 after you had seen this person; is that right?

14:20:58 1 **A** Right. Right.

14:20:59 2 **Q** Okay. And then Detective McDormett asked you
14:21:03 3 some more questions. He asked you: Give us the broadest
14:21:06 4 time range that you think it could have been.

14:21:08 5 And you say, okay, because often we take a
14:21:10 6 nap in the afternoon. Like at 12:00 to 1:00 or so. This
14:21:13 7 is page eleven.

14:21:14 8 Detective McDormett said: Ah-huh.

14:21:17 9 And then you say and I don't know if it was
14:21:20 10 after that I would say anywhere from one to 6:30-ish.

14:21:23 11 **A** Well, I just remember that the sun was going down
14:21:27 12 and I could still see, so I don't know what time in July
14:21:31 13 that the sun is going down. It could have been 7:30 to
14:21:35 14 8:00-ish or you know I don't know.

14:21:36 15 **Q** This is a little confusing here, but -- but I am
14:21:41 16 not talking now about what you remember today of the
14:21:45 17 circumstance. I am just asking you back on September 30th
14:21:47 18 of 2008 you remember telling the detective that it was
14:21:50 19 anywhere from one o'clock to 6:30-ish. That's what it
14:21:54 20 said?

14:21:54 21 **A** I probably -- I said that, but I -- I wasn't
14:21:59 22 aware of the time. I was a little rattled, too, talking
14:22:04 23 to them.

14:22:05 24 **Q** Okay. You're pretty sure that the sun doesn't go
14:22:07 25 down at one o'clock in the afternoon?

14:22:09 1 **A** Well, no, it doesn't and in the summer time it
14:22:12 2 goes down later, so -- but I did remember specifically
14:22:16 3 that the sun was starting to go down because I was working
14:22:19 4 on it late.

14:22:21 5 **Q** Okay. Now, do you remember when Mr. Robertson is
14:22:24 6 and I came to your home on May 11th of this year, telling
14:22:28 7 us that you had seen some newspaper photos of Mr. Democker
14:22:32 8 between the time you first talked to the police and the
14:22:35 9 time we came to see you. Do you remember that?

14:22:37 10 **A** I do.

14:22:37 11 **Q** Do you remember telling us that if Mr. Democker
14:22:41 12 looked anything like his newspaper photos on July 2nd,
14:22:45 13 2008, then that wasn't the person you saw?

14:22:47 14 **A** Because he had all gray hair at that time in the
14:22:50 15 newspaper.

14:22:52 16 **Q** Okay.

14:22:52 17 **A** And I don't remember gray hair at all.

14:22:54 18 **Q** Okay. And you said at page four of our
14:22:59 19 transcript, it seemed like it was a younger man with dark
14:23:03 20 hair and it was longer like down, down, you know, past his
14:23:07 21 ears, down almost to his shoulders. That's what you told
14:23:10 22 us?

14:23:11 23 **A** After I read the two scripts, I saw that I had
14:23:15 24 said one short hair and one longer hair, and now I --
14:23:19 25 obviously I can't really remember the detail of that, and

14:23:23 1 so I would rather not say whether it was short or long.

14:23:27 2 Is that okay?

14:23:28 3 Q Then you said Mr. Robertson asked you about -- we
14:23:33 4 were joking a little bit about how old we are.

14:23:35 5 Mr. Robertson says, but when you say
14:23:38 6 younger, can you -- are you saying a teenager in her 20,
14:23:41 7 30, 40s something?

14:23:42 8 And you say, on line 27, no, I don't think
14:23:44 9 it was a teenager. They were bigger than that. I'm
14:23:47 10 thinking maybe college age or a little older. I just
14:23:50 11 don't know. I couldn't see his face. I didn't, you know,
14:23:53 12 because I think his hair was flying.

14:23:54 13 And so on May 11th, this is just several
14:23:58 14 weeks ago, you told Mr. Robertson and me that the person
14:24:01 15 you thought was maybe college age or a little older?

14:24:06 16 A Yeah. I -- it's hard to say because I couldn't
14:24:09 17 really see the person's face. It was just on the sides
14:24:13 18 and --

14:24:16 19 Q Then Mr. Robertson came back the next day without
14:24:18 20 you, right, with some photographs? Correct?

14:24:19 21 A Correct.

14:24:20 22 Q And he showed you a photograph and by the way, up
14:24:23 23 to this point had you never been shown any photographs by
14:24:26 24 police?

14:24:26 25 A That's correct.

14:24:27 1 Q So Mr. Robertson showed you a photograph and told
14:24:30 2 you this was a photograph of Mr. Democker taken by the
14:24:33 3 police on the night of July 2nd and 3rd, right? Do you
14:24:38 4 remember what you told Mr. Robertson at --

14:24:42 5 A Yeah. I said I didn't think it was him, but it's
14:24:47 6 hard to say because I didn't see his face.

14:24:48 7 Q This is what you said on page 15, Mr. Robertson
14:24:53 8 said at line 12: So that's exactly what he would look
14:24:56 9 like on --

14:24:57 10 A You say okay.

14:24:58 11 Mr. Robertson finishes: That day.

14:24:59 12 You say at line 15, well, the person I saw,
14:25:02 13 his hair was definitely brown to dark, medium to dark
14:25:06 14 brown and it was not down to his shoulders, but it was a
14:25:08 15 longer style and it was curly or ruffled or something from
14:25:12 16 the wind, you know, so that he -- I don't recall any gray
14:25:14 17 hair at all.

14:25:15 18 Mr. Robertson: So does this person look
14:25:17 19 like the person you saw on the bicycle that day?

14:25:20 20 You say: I don't think so. Not with that
14:25:23 21 hair.

14:25:23 22 So that is what you told Mr. Robertson 13
14:25:27 23 days ago?

14:25:28 24 A Yeah. But that's been like a year-and-a-half
14:25:30 25 later and so I am not sure. I -- I was just telling what

14:25:36 1 I remembered when I talked to Mr. Butner. So I'm not sure
14:25:46 2 about his hair.

14:25:47 3 Q Would it be fair to say you just don't know who
14:25:49 4 you saw?

14:25:50 5 A I just saw a man or whatever going down the road
14:25:54 6 on a bike.

14:25:55 7 Q And now you are saying you don't know how old
14:25:57 8 that person was?

14:25:58 9 A Well, no, how can you tell in five seconds?

14:26:01 10 Q Well, you said before, just two weeks ago, that
14:26:06 11 you thought the person was maybe college age or a little
14:26:08 12 about bit older. You told us that.

14:26:10 13 A Uh-huh.

14:26:11 14 Q Okay.

14:26:11 15 A Yeah, I did.

14:26:12 16 Q Just two weeks ago?

14:26:13 17 A I know.

14:26:14 18 Q Okay. Now you have had a chance to meet with
14:26:16 19 Mr. Butner and now you are saying you just don't know what
14:26:19 20 you remember?

14:26:20 21 A Well, no. Because at the beginning when I talked
14:26:24 22 to the detective, I told him that he had short hair right
14:26:28 23 in the first one, and then when I talked to you again, it
14:26:30 24 was long hair. So I -- I guess I am confused, so I don't
14:26:36 25 know.

14:26:36 1 Q Okay. Let's talk about the bike. Do you
14:26:38 2 remember what you told the detectives on September 30th,
14:26:41 3 2008 about the shape and color of the bike?

14:26:43 4 A I think I told them it didn't have any fenders
14:26:49 5 and I think I told them it was darker.

14:26:51 6 Q Here is what you said page 15, line 14. You
14:26:56 7 said: It just looked like a normal boy's bike.

14:26:59 8 Detective McDormett: A boy's bike?

14:27:00 9 And you said, yeah, with bars across.

14:27:02 10 Oh, okay. You said not a girl's bike.

14:27:04 11 Detective McDormett: When you say boys, do
14:27:07 12 you mean man's, also, or boys?

14:27:07 13 Yeah.

14:27:08 14 Or a man's bike?

14:27:09 15 Yeah. Okay.

14:27:10 16 Do you recall anything about the color of
14:27:12 17 the bike?

14:27:12 18 It seemed like -- I can't be positive, but
14:27:15 19 it seemed like the backpack was dark and the bike was
14:27:18 20 maybe dark.

14:27:18 21 Detective McDormett: Okay. You said like a
14:27:21 22 navy blue or something.

14:27:23 23 I don't know.

14:27:23 24 Then later Detective McDormett says: So
14:27:25 25 when you say dark blue, could you have meant just a darker

14:27:28 1 color or --

14:27:29 2 You say: Could have been. It could have
14:27:31 3 been black or dark gray even.

14:27:32 4 Correct?

14:27:33 5 **A** Yeah. That's what I said.

14:27:34 6 **Q** You have seen a picture of Mr. Democker's bike
14:27:36 7 and it's --

14:27:36 8 **A** It's red.

14:27:37 9 **Q** -- it's not navy blue or black or dark gray?

14:27:40 10 **A** Right.

14:27:40 11 **Q** And it's not a boy's bike because it doesn't have
14:27:42 12 the straight tube across the top, right?

14:27:44 13 **A** Right.

14:27:45 14 **Q** So the bike -- the picture of the bike that you
14:27:48 15 saw is not the bicycle that you saw on July 2nd, is it?

14:27:51 16 **A** As far as I can tell, it was not. Nonetheless
14:27:56 17 the legs camouflaged it with the Levis.

14:27:59 18 **Q** Completely so that you couldn't see the color or
14:28:01 19 the shape?

14:28:02 20 **A** Yeah.

14:28:02 21 **Q** Or anything about it?

14:28:04 22 **A** Well, his legs were bent like that, you know.
14:28:09 23 The person that I saw.

14:28:09 24 **Q** But you tell Detective McDormett on September
14:28:11 25 30th that you could see the bike well enough to know that

14:28:14 1 it was a boy's or man's bike with a bar across?

14:28:17 2 A Yeah.

14:28:18 3 Q And so --

14:28:19 4 A That's what I said.

14:28:20 5 Q -- less than two months after it happened, that
14:28:22 6 is what you remember, correct?

14:28:23 7 A Yeah.

14:28:24 8 Q And now you've finally seen a picture of
14:28:26 9 Mr. Democker's bike and you are telling us here today that
14:28:28 10 that's not the bike you saw, correct?

14:28:31 11 A I don't believe it was.

14:28:35 12 Q And you said that the person you saw was wearing
14:28:42 13 maybe long pants or Levis and a short-sleeved button down
14:28:46 14 shirt?

14:28:47 15 A Yeah. That's what I said.

14:28:49 16 Q That's what you saw?

14:28:50 17 A Yeah.

14:28:51 18 Q That's what you said you saw. He wasn't wearing
14:28:53 19 a hat, correct? And then you told Mr. Robertson and me
14:28:57 20 that his hair was flying. You could see his hair was
14:28:59 21 moving, correct?

14:28:59 22 A Uh-huh.

14:29:00 23 Q Okay. And then you looked at the photograph of
14:29:02 24 Mr. Democker, the thing that struck you on May 11th, or
14:29:07 25 could have been May 12th, was the person's hair in the

14:29:11 1 photograph, Mr. Democker, but was not the hair of the
14:29:14 2 person you saw on July 2nd. Just wasn't the same,
14:29:17 3 correct?

14:29:17 4 **A** As far as I can remember, yeah.

14:29:24 5 **Q** Thank you.

14:29:25 6 Do you remember taking Detective McDormett
14:29:28 7 out into your garage like you did with Mr. Robertson and
14:29:30 8 me and showing him the bicycles in your garage?

14:29:33 9 **A** I do, uh-huh.

14:29:34 10 **Q** To show them the kind of bicycle you were talking
14:29:37 11 about?

14:29:37 12 **A** Uh-huh.

14:29:38 13 **Q** Do you remember they took photographs?

14:29:40 14 **A** Yes.

14:29:40 15 **Q** You're sure about that, that they took
14:29:44 16 photographs?

14:29:44 17 **A** Yes. Because they made a point of going out and
14:29:52 18 getting your camera. One of the guys.

14:29:56 19 **Q** The person you saw was not wearing a bicycle
14:29:58 20 helmet or a hat of any kind?

14:30:00 21 **A** No. No.

14:30:01 22 **Q** And then you said what called your attention was
14:30:04 23 that this person seemed younger and fitter than the
14:30:06 24 majority of people in your neighborhood who go out for
14:30:09 25 bicycle rides?

14:30:09 1 **A** Well, that could be true. I don't know. I --

14:30:14 2 **Q** You told us that there were a lot of retired

14:30:16 3 folks in your neighborhood and they tended not to be --

14:30:18 4 **A** Right.

14:30:18 5 **Q** -- so fit or to ride a bike so fast, correct?

14:30:21 6 **A** Right.

14:30:22 7 **Q** That is one of the things that caused this person

14:30:25 8 to come into your attention, correct?

14:30:26 9 **A** Uh-huh.

14:30:27 10 **Q** You is also said that your son-in-law is a police

14:30:29 11 officer?

14:30:30 12 **A** Yes. That's correct.

14:30:31 13 **Q** Okay. And you pride yourself on being aware of

14:30:37 14 what's going on around you?

14:30:38 15 **A** I try to be, yes.

14:30:41 16 MR. SEARS: Thank you. I don't have any other

14:30:42 17 questions, your Honor.

14:30:44 18 THE COURT: Mr. Butner.

14:30:46 19 REDIRECT EXAMINATION

14:30:46 20 MR. BUTNER: Thank you.

14:30:47 21 **Q** Ms. Johnson, on that day, how long were you

14:30:52 22 sitting in the sewing room doing your sewing on the

14:30:56 23 tablecloth and napkins for the 4th of July?

14:30:58 24 **A** Well, I had been in quite a while because it

14:31:00 25 takes quite a long time to make a large tablecloth and

14:31:03 1 napkins, so...

14:31:03 2 Q Okay. Were you there all afternoon?

14:31:05 3 A Um, well, not all afternoon. I probably ate
14:31:08 4 dinner and then went back in there.

14:31:10 5 Q Okay. And during that entire time that you were
14:31:13 6 seated in the sewing room, did you see any other bike
14:31:16 7 riders?

14:31:17 8 A No. I do occasionally, you know, but not then.

14:31:20 9 Q But not that day?

14:31:21 10 A Right.

14:31:22 11 Q Okay. And this person that you describe, they
14:31:28 12 seemed younger and fitter, what was it about them that
14:31:31 13 made them seem younger and fitter to you?

14:31:33 14 A I just compared them to my husband because he's
14:31:39 15 tall and thin.

14:31:40 16 Q Okay. How tall is your husband?

14:31:42 17 A Six-one.

14:31:43 18 Q And what is his weight?

14:31:44 19 A About 170.

14:31:47 20 Q So he is a tall and slender gentleman?

14:31:50 21 A Correct.

14:31:50 22 Q And this person on the bike was about the same
14:31:53 23 size as your husband?

14:31:54 24 A I believe so. Yeah. Best I could tell.

14:31:56 25 Q Does your husband to you look younger and fitter

14:32:00 1 than his stated age?

14:32:02 2 **A** Yes, because he's 71 and he -- we have been
14:32:06 3 married 40 years, so I still think he is young.

14:32:08 4 **Q** All right. I bet that's music to his ears.

14:32:14 5 Okay. I don't have any further questions.
14:32:16 6 Thank you very much.

14:32:17 7 **A** Okay. I'm sorry.

14:32:19 8 THE COURT: You may step down. Thank you.

14:32:20 9 THE WITNESS: Okay. Thank you.

14:32:28 10 THE BAILIFF: May Ms. Johnson be excused?

14:32:30 11 THE COURT: Yes. You are excused, Ms. Johnson.
14:32:32 12 Thank you.

14:32:32 13 I guess at this point, being your motion, I
14:32:52 14 will have you go first.

14:32:53 15 MR. SEARS: Thank you, your Honor.

14:32:54 16 THE COURT: Unless there is additional evidence?

14:32:55 17 MR. SEARS: No, your Honor.

14:32:56 18 I am glad we have the transcript.

14:33:00 19 Look, here's the situation, your Honor.

14:33:02 20 This lady, there was a delay in getting her statement of
14:33:06 21 several months, but several months after the event she
14:33:10 22 said she saw a boy. She was led into saying maybe it was
14:33:14 23 a man. She said she saw a particular type of bicycle that
14:33:16 24 was dark. Perhaps navy blue, dark gray or black. That it
14:33:22 25 had a straight top to. That the person was wearing long

14:33:26 1 pants, a button down short sleeved shirt. She saw the
14:33:29 2 person for five or six seconds heading generally from west
14:33:33 3 to east in front of her house. As I think we may have
14:33:36 4 mentioned, she lives roughly midway between Williamson
14:33:39 5 Valley and Glenshandra.

14:33:41 6 She originally told the police that the --
14:33:48 7 that this took place between two and five and then when
14:33:52 8 asked to give a broader range, she said it was between one
14:33:56 9 and 6:30. Now she says today that it's -- got a little
14:34:02 10 water accident here, your Honor -- I am not distracted at
14:34:06 11 all. I will press on, your Honor.

14:34:09 12 Good thing we polyurethaned these tables to
14:34:12 13 make sure they are alike.

14:34:14 14 At any rate, your Honor, that's what she
14:34:17 15 told the police she saw, and then nothing happens. No one
14:34:23 16 talks to her for the longest time, and in May of this year
14:34:29 17 when we realized that the State was going to try to call
14:34:32 18 her as a witness, Mr. Robertson and I went out and talked
14:34:35 19 to her, and this is what she said and we have now put this
14:34:38 20 into the record.

14:34:39 21 Before we even got started, she said, you
14:34:41 22 know, I have looked at Mr. Democker's picture in the
14:34:43 23 paper. If he looked anything like that on the night of
14:34:45 24 the event, that's not the person I saw. We turned the
14:34:48 25 tape on. She repeated that statement, and she said that

14:34:50 1 it was largely due to the difference in his hair. That
14:34:54 2 the person in the newspaper picture had gray hair. She
14:34:56 3 didn't see any gray hair. She saw that.

14:34:59 4 We then also realized from this interview
14:35:01 5 that she had never been shown any photographs.
14:35:04 6 Mr. Robertson went back the next day with photographs that
14:35:09 7 law enforcement had taken. A full -- by the way, I don't
14:35:11 8 know. Have you seen these photographs, your Honor? I
14:35:13 9 have them here if you would like to look at them.

14:35:18 10 THE COURT: I don't know.

14:35:19 11 Any objection, Mr. Butner?

14:35:21 12 MR. BUTNER: I don't have any objection, Judge,
14:35:23 13 but I am not sure I see the relevance either. And they
14:35:25 14 haven't been admitted into evidence, and they weren't
14:35:28 15 presented to the witness for identification either.

14:35:30 16 MR. SEARS: We gave the State a tape recording
14:35:33 17 that -- in which Mr. Robertson carefully identified these
14:35:35 18 photographs. I would be happy to bring her back and have
14:35:37 19 her confirm if the State has any questions these are the
14:35:39 20 photographs we showed her. They're from the disclosure.
14:35:42 21 They are photographs taken by law enforcement. If the
14:35:44 22 State wants me to do that, I will do that.

14:35:46 23 MR. BUTNER: No, I don't want you to do that.

14:35:48 24 She said she couldn't identify the bicycle.
14:35:52 25 I am assuming that is what you are going to show.

14:35:53 1 MR. SEARS: No. Just to outlay a foundation
14:35:55 2 these are the photographs and move their admission.
14:35:57 3 THE COURT: You don't need to bring her back to
14:35:58 4 do that. You can do that with Mr. Robertson.
14:36:02 5 MR. SEARS: I'll make an offer of proof that if
14:36:03 6 Mr. Robertson were called and sworn, he would say these
14:36:05 7 are the photographs he showed her. This photograph of
14:36:07 8 Mr. Democker was taken by the police and this photograph
14:36:11 9 of Mr. Democker's bike taken by the police. We point it's
14:36:14 10 leaning up on a gate on Glenshandra.
14:36:16 11 THE COURT: Do you want to re-open to do that?
14:36:20 12 MR. SEARS: I can do that unless the State would
14:36:24 13 accept my offer of proof.
14:36:27 14 MR. BUTNER: No. No objection.
14:36:29 15 THE COURT: All right. For purposes of this
14:36:31 16 hearing, are you carrying on with same numbers we have for
14:36:36 17 everything else?
14:36:37 18 THE CLERK: Yes.
14:36:38 19 THE COURT: Probably two million.
14:36:42 20 MR. SEARS: Two million one and two million two
14:36:45 21 for identification, your Honor.
14:36:55 22 THE COURT: Rather than let the record reflect
14:36:57 23 numbers, I think I will let you pick out.
14:37:00 24 THE CLERK: Actually it's going to be 2222 and
14:37:04 25 2223.

14:37:05 1 THE COURT: Exhibits 2222 and 2223 are admitted
14:37:08 2 for purposes of this hearing.

14:37:10 3 MR. SEARS: Which is which, Rachel?

14:37:14 4 Let's then make the bike 2222.

14:37:16 5 THE COURT: Bike is 2222.

14:37:18 6 MR. SEARS: And this -- your Honor, I would let
14:37:20 7 you have those. I would move their admission.

14:37:24 8 THE COURT: Mr. Butner, any objection to the
14:37:26 9 admission of these exhibits for identification into
14:37:29 10 evidence for this hearing only?

14:37:30 11 MR. BUTNER: No.

14:37:32 12 THE COURT: At least at this point. The exhibits
14:37:40 13 without objection then are admitted 2222 and 2223 for
14:37:43 14 purposes of this hearing.

14:37:45 15 MR. SEARS: Thank you, your Honor.

14:37:46 16 Now -- and so on May 12th of this year, when
14:37:50 17 she was shown those photographs, she has testified now
14:37:53 18 that she said that's not the man I saw. The person's
14:37:58 19 hair -- and let me get -- read back her quote. Let me get
14:38:01 20 it right again for the record.

14:38:04 21 She told Mr. Robertson: The person I saw,
14:38:07 22 his hair was definitely brown to dark, medium to dark
14:38:09 23 brown, and it was not down to his shoulders, but longer
14:38:12 24 style, and it was curly or ruffled or something from the
14:38:14 25 wind, you know, so -- I don't recall any gray hair at all.

14:38:17 1 So does this person look like the person you
14:38:19 2 saw on the bicycle that day?

14:38:21 3 I don't think so. Not with that hair, so --

14:38:25 4 I think she has confirmed, again, that the
14:38:29 5 person she saw was not Mr. Democker based on the
14:38:33 6 photograph and, similarly, she said that, again here today
14:38:38 7 to her credit, said that based on the description of the
14:38:41 8 bicycle and now that she has finally seen 2223, the
14:38:45 9 photograph of the bicycle, that she's pretty sure that's
14:38:48 10 not the bicycle she saw that night.

14:38:50 11 The only thing she said by way of
14:38:52 12 qualification was that maybe the person's legs covered up
14:38:54 13 part of the bike, but on further examination, she said --
14:38:57 14 but she was able on September 30th, 2008, to say that the
14:39:01 15 bike was dark in color. Had a straight top tube. All
14:39:05 16 characteristics that are wildly different from the
14:39:07 17 photograph 2223 in evidence in this case, which is without
14:39:12 18 question Mr. Democker's bicycle as it looked on the night
14:39:15 19 in question.

14:39:15 20 So here is what we have -- and then there
14:39:17 21 has been one more effort to work with her by the State
14:39:21 22 even after we talked with her. She had a session in the
14:39:24 23 County Attorney's office, and it was pretty clear that
14:39:28 24 she's come to court here today now confused about what she
14:39:32 25 is supposed to remember in this case, but the sum of it

14:39:36 1 hasn't really changed.

14:39:37 2 She didn't identify Mr. Democker. She
14:39:39 3 didn't see a person who looked like Mr. Democker and, in
14:39:41 4 fact, when shown photographs of Mr. Democker and his bike
14:39:44 5 is now clear that's not the person or the bicycle she saw
14:39:47 6 that night.

14:39:47 7 So where does that leave us? That leaves us
14:39:50 8 with what I described last week as an impermissible and
14:39:56 9 Rule 403 unfairly prejudicial inference that the State
14:39:59 10 would clearly want to draw that, in fact, she saw
14:40:03 11 Mr. Democker riding his bike that night, because if it
14:40:05 12 wasn't Mr. Democker riding his bike, then she has
14:40:08 13 identified someone not connected with this case, although
14:40:12 14 I did take to heart the Court's comment that maybe the
14:40:14 15 person was connected with this case.

14:40:16 16 And -- and understand that it may be that
14:40:20 17 the person she saw is the person responsible for laying
14:40:23 18 down the bicycle tire impressions at the end of
14:40:26 19 Glenshandra and that person's not Steve Democker, but on
14:40:30 20 balance, and I think it's pretty clear now, this woman's
14:40:32 21 memory is so confused, her statements are so confused, she
14:40:36 22 has not been asked to, nor could she make an in-court
14:40:39 23 identification of Mr. Democker and, in fact, when shown in
14:40:42 24 a very straight up way law enforcement photographs, she
14:40:46 25 has said that's not the person or the bike she saw.

14:40:49 1 The only possible plausible basis for
14:40:53 2 calling her in the case would be to put in the jury's mind
14:40:56 3 the impermissible inference that she saw Mr. Democker and
14:40:59 4 if it's not that, then her testimony has no place in this
14:41:04 5 case.

14:41:04 6 THE COURT: Mr. Butner.

14:41:05 7 MR. BUTNER: Judge, what we have here is an
14:41:08 8 ambush interview by defense who went out there and
14:41:11 9 interviewed this lady a couple of years after the incident
14:41:14 10 and showed her photographs and, in essence, led her down
14:41:18 11 the garden path when she had previously stated in her
14:41:21 12 first interview to the police that she could not identify
14:41:24 13 the person. That the person had short hair, etcetera, all
14:41:28 14 of that. And all of this comes out in a subsequent
14:41:31 15 interview with Mr. Sears and his investigator.

14:41:33 16 The long and short of it being that her
14:41:37 17 unvarnished testimony, so to speak, at the beginning of
14:41:41 18 this is that she couldn't identify the person that rode
14:41:45 19 by. She saw somebody ride by that was of a very similar
14:41:48 20 build to her husband. That person appeared to be a
14:41:52 21 younger and fitter type of person, and she did make the
14:41:56 22 leap that person then must have been college age or
14:41:59 23 something along those lines.

14:42:01 24 She was specific about her description of
14:42:06 25 the person. She was specific about the bicycle tires.

14:42:09 1 She was specific about their attire, long pants and the
14:42:13 2 unusual nature of that. Specific about a backpack.

14:42:18 3 All of the things that Mr. Sears brings up
14:42:21 4 go to the weight of the evidence and are appropriate for
14:42:25 5 cross-examination. She was also fine about the time in
14:42:29 6 terms of when the sun was going down, and she was not
14:42:34 7 inconsistent with that in any of the interviews.

14:42:37 8 So what we have here is a lady who has been
14:42:40 9 pushed around in the interview process and is now
14:42:44 10 testifying in essence as to what she absolutely remembers
14:42:47 11 and not guessing, and not trying to infer this or that.
14:42:53 12 And if you take a look at the bicycle, Judge, there is a
14:42:55 13 bar that goes across the center of that bicycle and it is
14:42:59 14 a boy's bike, so to speak. It's a man's bike and it's a
14:43:02 15 mountain bike and it does have fatter tires. She maybe
14:43:06 16 didn't get the color right but, you know, it was going by
14:43:08 17 in a span of about four seconds or so, or a matter of
14:43:12 18 seconds is what she said actually.

14:43:14 19 So in terms of her testimony, again, I would
14:43:19 20 submit that it is material and relevant and probative of
14:43:24 21 significant issues in this fact (sic) and one of them
14:43:27 22 being the bicycle rider that left the only set of bicycle
14:43:31 23 tracks at the end of the Glenshandra trailhead, and I
14:43:35 24 think that her testimony should be admitted on that basis.

14:43:38 25 It's not unfairly prejudicial. It may be

14:43:41 1 prejudicial to the defense because it just happens to
14:43:44 2 dovetail with the fact that Mr. Democker was out riding
14:43:48 3 his bike that day a short distance away, according to him
14:43:52 4 across Williamson Valley Road.

14:43:56 5 It's something for the jury to consider,
14:43:59 6 Judge, and they consider -- they can consider her witness
14:44:03 7 qualifications with the kind of instructions that this
14:44:06 8 Court gives. This is not unfair evidence. This is
14:44:10 9 material and relevant evidence that is subject to
14:44:14 10 cross-examination.

14:44:17 11 THE COURT: Mr. Sears.

14:44:21 12 MR. SEARS: Your Honor, I resist the temptation
14:44:23 13 to be snarky here and say that this witness said she was
14:44:27 14 nervous when the police came by. I wouldn't characterize
14:44:30 15 that as an ambush interview any more than the interview
14:44:34 16 that Mr. Robertson and I did in this case.

14:44:37 17 But the point is she had a recollection in
14:44:40 18 2008. The recollection was she saw a boy. Her
14:44:44 19 recollection was she saw a dark bike that had a straight
14:44:47 20 top to, and that the person went by and she saw him for
14:44:52 21 five or six seconds. And she never described
14:44:55 22 Mr. Democker. She was never shown photographs. The State
14:44:58 23 never disclosed the photographs that the police took of
14:45:00 24 the bicycles in her garage at that point.

14:45:03 25 Finally, in May of this year, as we were

14:45:06 1 running up to trial in this case, she was shown law
14:45:09 2 enforcement photographs and said unequivocally that's not
14:45:13 3 the person I saw and that's not the bicycle I saw.

14:45:16 4 The best the State can do is she was led
14:45:18 5 down the garden path or primrose path and she was
14:45:21 6 ambushed. I think the Court had an opportunity to observe
14:45:23 7 her demeanor. She's simply confused now about what she
14:45:26 8 remembered or she didn't remember and her confusion hasn't
14:45:29 9 been helped by the fact she had another session after she
14:45:32 10 talked to us with the State and comes to court confused
14:45:35 11 again.

14:45:35 12 When she talked to us, she wasn't confused
14:45:37 13 at all. She said this is what -- this is not the person I
14:45:39 14 saw. This is not the bicycle I saw, and that's not
14:45:43 15 inconsistent with what she said to the police in September
14:45:45 16 of 2008. It's just more thorough. She was asked clearer
14:45:50 17 questions and shown pictures. Is this what you saw.

14:45:54 18 And unless this witness is going to be able
14:45:57 19 to say I saw either that person over there and make a
14:46:01 20 proper Dessureault in-court identification, which the
14:46:05 21 State says she can't do, which she says she can't do of
14:46:08 22 this person, and unless she can describe a person that
14:46:12 23 even remotely resembles Mr. Democker or describe a person
14:46:17 24 whose bike mostly resembled that of Mr. Democker and
14:46:19 25 overcome the fact that she says it's not him and it's not

14:46:21 1 his bike, then when she comes to court and testifies, it's
14:46:25 2 not a matter of the weight of the evidence and
14:46:27 3 cross-examination.

14:46:28 4 It's an attempt by the State to infer
14:46:31 5 improperly to the jury that she saw Mr. Democker and then
14:46:34 6 put the burden improperly on the defense to show why she
14:46:37 7 didn't. This is the kind of evidence that is subject to
14:46:42 8 preclusion under Rule 403, because if it is as advertised,
14:46:48 9 which I think it is, and if it is for the purpose which it
14:46:51 10 obviously is, which I think the Court has already
14:46:55 11 understood last week, then it is not for the defendant in
14:47:00 12 this case to be left to try and convince the jury that she
14:47:03 13 has a faulty memory or that she was confused, etcetera,
14:47:06 14 etcetera. That's not proper. This evidence, it is unfair
14:47:09 15 and prejudicial, not relevant most of all, because she
14:47:13 16 didn't identify Mr. Democker or anyone remotely like him
14:47:16 17 or his bicycle.

14:47:17 18 And I think -- I think an easy way to
14:47:21 19 resolve this problem is to preclude this evidence.

14:47:24 20 The State has now had an opportunity to
14:47:26 21 bring her on and put her in front of the Court and I can't
14:47:28 22 imagine the Court would think her testimony is so clear
14:47:31 23 and conclusive that it establishes anything like the
14:47:35 24 proposition that the State is offering it for.

14:47:40 25 THE COURT: The evidence rules title Article IV

14:47:47 1 are Relevancy and Its Limits, and you start with the basic
14:47:51 2 proposition that relevant evidence is, as defined by
14:47:56 3 Mr. Butner and by the rules, which he was quoting,
14:48:01 4 evidence having any tendency to make the existence of any
14:48:03 5 fact that is of consequence to the determination of the
14:48:06 6 action more probable or less probable than it would be
14:48:09 7 without the evidence.

14:48:10 8 In general terms, the evidence is relevant
14:48:15 9 that someone saw a bicycle rider on the day of the event
14:48:21 10 of Ms. Kennedy's death riding in the direction that could
14:48:26 11 place them in the vicinity of where tire -- bike tire
14:48:33 12 prints were later found and some shoes -- shoe prints were
14:48:37 13 later found that may tie in to the residence in which
14:48:46 14 Ms. Kennedy died.

14:48:47 15 But I don't think that's the end of the
14:48:53 16 question in that general nature of determination that,
14:48:56 17 okay, there was a bike rider who was going in the general
14:49:00 18 direction that, if followed, could take him to be the bike
14:49:03 19 that was left at the area of the gate at Glenshandra or
14:49:09 20 the prints were observed.

14:49:11 21 It's a starting point. It's not, at this
14:49:16 22 point in time, appears to be the only witness that
14:49:18 23 identifies any bike rider of any sort. But I think you
14:49:22 24 also have to take all of the testimony and weigh its
14:49:28 25 value, as a judge in a gate keeping function only, as to

14:49:32 1 whether it fits within Rule 401, which to this judge does
14:49:38 2 appear to be the case, and Rule 402 that states that
14:49:41 3 relevant evidence is generally admissible.

14:49:44 4 But you also have to analyze it in terms of
14:49:46 5 Rule 403. So what we have in total terms are a witness
14:49:53 6 who is interviewed substantially after the fact of the
14:49:57 7 event of July 2nd, who at the time identifies a bike rider
14:50:05 8 in general terms to have been in the area going in front
14:50:08 9 of her house on the street from two o'clock to five
14:50:18 10 o'clock. She did indicate she was -- I forget what the
14:50:23 11 word was -- it wasn't nervous. It was rattled. She was
14:50:48 12 rattled in talking to the police in the original interview
14:50:51 13 that itself was a couple of months after the event.

14:50:55 14 And then with some apparent question about,
14:51:03 15 well, what's the broadest possible range in which you
14:51:06 16 could have seen this person? One o'clock to 6:30-ish.

14:51:10 17 In her memory, now, she has the sun going
14:51:13 18 down, which on July 2nd isn't even -- certainly not at the
14:51:18 19 one o'clock, two o'clock stage. It's possible that her
14:51:23 20 conception of what that means could be 6:30. Could be
14:51:27 21 later than that, because it's July 2nd after the --
14:51:36 22 shortly after the summer solstice the Court can take
14:51:39 23 judicial notice of.

14:51:41 24 And in her description, she refers to boy
14:51:48 25 originally. Changes that to man. Indicates a man's bike.

14:51:55 1 Indicates black or dark gray, but darker color in terms of
14:52:02 2 the bike. Talks about no hat. No hair -- excuse me -- no
14:52:12 3 helmet and hair which is brown to dark at the time. The
14:52:19 4 police concededly did not show her photographs, but even
14:52:32 5 back then seemed like a younger man.

14:52:38 6 Now, when dealing with Detective McDormett,
14:52:45 7 she is talking about the person wearing Levis. The
14:52:53 8 height, weight issue seems like a taller person, but still
14:52:59 9 in reasonably fit shape. Six-one, 170 which she said her
14:53:04 10 husband is, and the person on the bike she was comparing
14:53:08 11 to that.

14:53:09 12 The bike in general terms was not what they
14:53:12 13 used to call a road bike, but seemed more akin to a
14:53:22 14 mountain bike. In other words, with the lack of fenders
14:53:25 15 and with the wider tires that mountain bikes have.

14:53:31 16 But, generally, the description appears to
14:53:34 17 have been somebody with a short sleeve button down shirt
14:53:38 18 and Levis or blue pants traveling fast for a brief few
14:53:46 19 seconds across her field of vision, and that's basically
14:53:51 20 what she remembers is there was a person on a bike that
14:53:53 21 appeared to be a boy or man of the height and weight that
14:53:58 22 I described with a backpack and nothing in particular
14:54:07 23 blocking her view after she mentioned the big tree on the
14:54:11 24 right.

14:54:15 25 But that's, in essence, the evidence the

14:54:17 1 State wishes to present to conclude -- presumably to have
14:54:22 2 the jury conclude that she saw a bike rider. That there
14:54:27 3 was, in fact, a bike rider in the area. Whether the bike
14:54:30 4 ties in or not to the rest of the events. When shown the
14:54:37 5 Exhibits 2222, which is the bike and 2223, which is the
14:54:43 6 law enforcement photograph of Mr. Democker from July 2nd
14:54:46 7 of 2008, apparently she indicates that neither of those is
14:54:53 8 what coincides with her memory.

14:55:01 9 She can't identify the person who rode
14:55:11 10 across her field of vision, but she isn't capable of
14:55:16 11 identifying anyone in the courtroom. To the extent she
14:55:20 12 has a recollection, she would exclude Mr. Democker because
14:55:25 13 of the color of his hair apparently principally, and she
14:55:31 14 indicated she did not see the person's face.

14:55:35 15 So, the evidence, though it's relevant,
14:55:42 16 having a tendency to make the existence of a fact, that is
14:55:45 17 to say that someone was riding a bike that may correspond
14:55:50 18 with the tire tracks, if one assumes the tire tracks and
14:55:54 19 the footprints which were found in the same vicinity was
14:55:56 20 the person who perpetrated the offense, it does make that
14:56:02 21 more probable than it would be without the evidence.

14:56:05 22 But then you get to the -- and you get to
14:56:08 23 the general rule relevant evidence is admissible, but then
14:56:11 24 you get to Rule 403. Although relevant, evidence may be
14:56:14 25 excluded if its probative value is substantially

14:56:16 1 outweighed by the danger of unfair prejudice, confusion of
14:56:20 2 the issues, or misleading the jury, or other
14:56:24 3 considerations of undue delay, waste of time or needless
14:56:28 4 presentation of evidence. It's not any of those, but it
14:56:31 5 seems to me that there are real dangers here in this
14:56:35 6 testimony with unfair prejudice, confusion of the issues
14:56:39 7 and in particular misleading of the jury.

14:56:43 8 If the point of the evidence is to suggest
14:56:45 9 that she may have seen Mr. Democker when she can't make an
14:56:50 10 in-court identification and has, to the knowledge of the
14:56:54 11 Court and prosecution, excluded Mr. Democker by virtue of
14:56:59 12 his hair color and perhaps other issues. I think that
14:57:02 13 this would be misleading to the jury and I would conclude
14:57:06 14 and do conclude that the otherwise relevant evidence has a
14:57:13 15 probative value that is substantially outweighed by the
14:57:15 16 danger of confusion of the issues, in particular
14:57:18 17 misleading of the jury and unfair prejudice to the
14:57:20 18 defense.

14:57:20 19 So I'll exclude this testimony on the basis
14:57:23 20 of a Rule 403 evaluation of her testimony.

14:57:27 21 MR. SEARS: Thank you, your Honor.

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14:57:30

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C E R T I F I C A T E

I, SANDRA K MARKHAM, Certified Reporter, do hereby certify that the foregoing pages constitute a true and accurate transcript of the proceedings had and testimony given in the hearing of the matter entitled as upon the first page hereof.

Dated: May 29, 2010.



Sandra K Markham, CR, RPR, CSR
Certified Reporter
Arizona License No. 50001

SANDRA K MARKHAM, CR, RPR
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